APPEAL NO. 040721
FILED MAY 24, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 4, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) did not sustain an injury in the course and scope of his employment on _____; that the claimant's claimed injury has become compensable because the appellant (self-insured) waived the right to dispute compensability by failing to timely contest the injury in accordance with Sections 409.021 and 409.022; and that the claimant had disability from August 1 through August 7, 2002. The self-insured appeals the hearing officer's determinations on the issues of waiver and disability. No response was received from the claimant. There is no appeal of the hearing officer's determination that the claimant was not injured in the course and scope of his employment on _____.

DECISION

Affirmed.

It is undisputed that the claimant was involved in a work-related motor vehicle accident (MVA) on _____. The claimant claimed that he injured his lower back in that MVA. It is clear from the medical reports that the claimant has some damage or harm to his lower back. The hearing officer found that the claimant has a low back condition and referenced the findings on an MRI report. A hearing officer can believe that a claimant has an injury, but disbelieve that the injury occurred in a work-related accident as claimed by the claimant. There is no appeal of the hearing officer's determination that the claimant did not sustain an injury in the course and scope of his employment on _____.

The self-insured completed an Employer's First Report of Injury or Illness (TWCC-1) on August 7, 2002. On August 29, 2002, the self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in which it reported that it first received written notice of the injury on August 7, 2002, and in which it denied that the claimant had disability due to a compensable injury. On September 2, 2002, the self-insured paid some medical bills for health care provided to the claimant on August 5 and August 7, 2002, for the claimed injury. On September 11, 2002, the self-insured filed a TWCC-21 in which it again reported that it first received written notice of the injury on August 7, 2002, and in which it denied the claim. The doctor the claimant first saw for his claimed injury released the claimant to return to work without restrictions on August 7, 2002. In answers to written interrogatories received by the self-insured in February 2004, the claimant divulged that he had sustained a prior workers' compensation injury to his low back in another state.

The self-insured contends that the hearing officer erred in finding that it received written notice of the claimed injury on August 7, 2002. There was testimony from the self-insured's adjuster that the written notice referenced in the TWCC-21s was the self-insured's TWCC-1. Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 124.1(a)(1) (Rule 124.1(a)(1)) provides in part that written notice of injury, as used in Section 409.021, consists of the insurance carrier's earliest receipt of: (1) the Employer's First Report of Injury. The carrier asserts that Rule 124.1(a)(1) directly contradicts Section 409.005(f), which provides that the Employer's First Report of Injury or Illness (TWCC-1) may not be considered to be an admission by or evidence against an employer or an insurance carrier in a proceeding before the Texas Workers' Compensation Commission or a court in which the facts set out in the report are contradicted by the employer or insurance carrier. The self-insured asserts that Section 409.005(f) forbids the TWCC-1 from being used as written notice of injury to the self-insured. We find no such prohibition in Section 409.005(f). Nothing in the TWCC-1 is being used against the self-insured. Rule 124.1(a)(1) merely uses receipt of the TWCC-1 as one way to establish written notice of injury to the self-insured. The evidence supports the hearing officer's finding that the self-insured received written notice of the claimed injury on August 7, 2002.

Section 409.021 as it existed prior to its amendment effective September 1, 2003, applies to this case. In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated: "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." The Appeals Panel also stated in that decision that it would decline to follow Texas Workers' Compensation Commission Appeal No. 023010-s, decided January 9, 2003, and held that "to comply with the Supreme Court's holding in Downs, the carrier has the burden to prove that it 'took some action within seven days,' and to present evidence indicating the action taken." The Appeals Panel went on to state in Appeal No. 030380-s, that "Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury." In Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003, the Appeals Panel cited Appeal No. 030380-s, *supra*, in determining that the carrier in that case had waived its right to contest compensability, and noted that a carrier cannot simply sit back and rely on the fact that benefits did not accrue prior to the date that it filed its dispute and argue that it did not waive its right to contest compensability. In the instant case, there is no evidence that within seven days of receiving written notice of the injury, the self-insured took any action indicating that it had accepted the claim or intended to pay benefits. Nor is there any evidence that the self-insured contested compensability within the seven-day period. In accordance with our decision in Appeal No. 030380-s, we conclude that the hearing officer did not err in

determining that the self-insured waived its right to contest compensability of the injury. Because the self-insured waived its right to contest the compensability of the claimed injury, the claimant's claimed injury is compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 031907, decided September 9, 2003. In addition, the evidence supports the hearing officer's determination that the claimant had disability from August 1 through August 7, 2002.

The self-insured asserts that the decision in Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), applies to the facts of the instant case. In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law." The Appeals Panel has held that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury, which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. In the instant case, the claimant claimed a lower back injury, there is medical evidence that the claimant has damage or harm to his lower back, and the hearing officer found that the claimant has a lower back condition as evidenced by the MRI findings. In accordance with our previous decisions, we do not find the Williamson decision to be applicable to the facts of this case.

The self-insured asserts that the hearing officer erred in not allowing it to reopen the issue of compensability based on newly discovered evidence (the 1998 injury) under Section 409.021(d). We perceive no error. In Texas Workers' Compensation Commission Appeal No. 031208, decided June 18, 2003, the Appeals Panel held that a carrier is required to take some action within seven days of receiving written notice of an injury in order to be entitled to reopen the issue of compensability based on newly discovered evidence. *See also* Texas Workers' Compensation Commission Appeal No. 032540, decided November 14, 2003. We do not find the decision relied on by the self-insured, Texas Workers' Compensation Commission Appeal No. 002193, decided October 30, 2000, to be persuasive with regard to the reopening argument in the instant case because that decision was decided prior to the Texas Supreme Court's decision in Downs, that taking some action within seven days is what entitles a carrier to a sixty-day period to investigate or deny compensability, and that because the carrier in the Downs case had neither initiated benefits nor provided grounds for refusal within the statutory deadline, it could not contest compensability.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge